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Expert Analysis

N.Y.'s New Laws Protecting Drinking Water From Emerging Contaminants

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Last year at this time we explored how New York implements the federal Safe Drinking Water Act 42 U.S.C. §§300f to 300j-27) (SDWA). See Michael B. Gerrard & Edward McTiernan, "Role of Safe Drinking Water Act in Protecting Health," N.Y.L.J., May 12, 2016. This year, New York's budget was adopted against the backdrop of continuing drinking water challenges in Flint, Mich. and across New York state. As a result, significant changes in the way drinking water will be protected, monitored and mitigated emerged from this year's New York state budget process. Although the Clean Water Bond Act grabbed most of the headlines, Gov. Andrew M. Cuomo also signed into law two new statutes plus several amendments to existing laws designed to place New York at the forefront of efforts to ensure that drinking water is safe. In adopting the Emerging Contaminant Monitoring Act (ECMA) and the Mitigation and Remediation of Certain Solid Waste Site and Drinking Water Contamination (the Solid Waste Site/Drinking Water Contamination Act) (Chapter 57 of Laws of New York, 2017, to be codified at §1112 of the Public Health Law (PBH) and Title 12 of the Environmental Conservation Law (ECL)), New York has signaled its intention to move beyond the existing federal SDWA requirements. These new laws have the potential to alter the landscape for many years to come. Today's article examines some of the key provisions of these new statutes and considers the impact that New York's approach might have on companies with past or present operations in the Empire State.

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The ECMA

The ECMA is designed to ensure that public water supplies in New York are tested and that test results are promptly disseminated to customers of public water systems. On this level, the basic framework of the ECMA closely follows the federal SDWA, and water system operators will be familiar with its test and notification protocols. However, the scope of the ECMA is far broader. Under the ECMA, the owners and operators of public water systems must test both for compounds regulated pursuant to the SDWA and for "any physical, chemical, microbiological or radiological substance listed as an emerging contaminant." New York's list of emerging contaminants will be promulgated by the Department of Health (DOH), and there are a variety of ways that compounds can end up on the list.

DOH is expected to monitor developments on the federal and state levels to identify candidate compounds. One additional mechanism for identifying emerging contaminants will be the newly created Drinking Water Quality Council. This 12-member public body shall, within one year of its initial meeting, recommend its first list of emerging contaminants as well as recommended testing regimes and notification levels. Notification levels are required to be set for all emerging contaminants based upon "available scientific information." All Drinking Water Quality Council recommendations are subject to review by the DOH Commissioner. The workings of the council could prove to be controversial, and interested parties may want to carefully monitor its actions.

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The ECMA is designed to avoid the regulatory morass associated with the SDWA's process for setting nationwide maximum contaminant levels (MCLs). However, precisely because emerging contaminants are not fully investigated or understood, setting notification and action levels may prove to be a difficult task, and the temptation will be great to use detection limits in lieu of health-based thresholds.

Once the DOH develops the list of compounds to be tested for and associated notification levels, the ECMA sets an ambitious schedule for testing and disclosure. The DOH must adopt regulations requiring all public water supply systems to test for emerging contaminants at least once every three years. Public water supply system operators must notify DOH within 24 hours of testing results which exceed notification levels, and all owners of real property served by the system must receive notification in accordance with a schedule established by the DOH but within a period which shall not exceed 90 days. Finally, property owners have 10 days to notify any tenants. By contrast, the federal SDWA only requires notification if an MCL is exceeded and the exceedance has the potential to cause serious health effects based upon short-term exposure (in which case notification must occur within 24 hours). Most SDWA reporting of MCL exceedances to customers only happens on an annual basis. (There is some risk that the independent notification requirements of the ECMA and SDWA will confuse customers.)

New Site Remediation Program

The Solid Waste Site/Drinking Water Contamination Act is omnibus legislation apparently designed to address the perceived inability of the Department of Environmental Conservation's (DEC) present programs for inactive hazardous waste disposal sites to protect drinking water supplies from contamination with regulated hazardous substances or substances on the soon-to-be-established list of emerging contaminants. The statute gives DEC new tools to identify solid waste disposal sites and other uncontrolled disposal locations that are causing or contributing to contamination of public water supplies. The new act allows DEC to undertake or order investigation and treatment of water supplies (especially installation of water purification systems or providing alternative sources of drinking water) at sites determined to be impacting drinking water supplies. However, DEC is required to refer sites to one of its existing inactive hazardous waste disposal programs before undertaking or requiring remediation (such as source removal).

The ECMA and the Solid Waste Site/Drinking Water Contamination Act are designed to be implemented together. The monitoring mandated by the ECMA will trigger the requirement to locate sources of contamination. Once a source is identified, DEC is required to identify and negotiate with all potentially responsible parties (PRPs). If the PRPs do not agree to act, DEC either implements the necessary mitigation and seeks to recover its costs or refers the site to another state or federal program.

One additional feature of the Solid Waste Site/Drinking Water Contamination Act is the requirement that DEC develop a solid waste site mitigation plan and priority list. Many of the sites eligible for this list are likely to be municipal landfills that were never properly capped and closed or at which long-term maintenance of the capping and leachate control systems have been inadequate. DEC has reportedly identified more than 1,700 potential municipal solid waste sites warranting investigation. The new law also empowers DEC to issue unilateral orders compelling PRPs to undertake both "mitigation and remediation."

Even before these new enactments, DEC was authorized under Title 31 of Article 15 of the ECL to prepare and implement a long-term strategy to restore and maintain groundwater quality, and all of New York's existing site clean-up programs already relied upon health-based groundwater remediation standards. It seems likely that this new law will create a new class of sites that will need to be investigated and cleaned up and that many of these sites will be in locations, such as Long Island, that heavily depend on groundwater for drinking water. Moreover, given the strict liability provisions of existing federal and state solid and hazardous waste laws, a substantial portion of the cost for these activities is likely to be shifted to commercial and industrial entities.

Other New Provisions

Chapter 57 also includes several additional provisions intended to support efforts to ensure that New Yorkers have safe drinking water. A new section, §1114, has been added to the PBH to give priority funding to municipalities with a high percentage of children with elevated blood lead levels to replace lead water service lines. In addition, Article 15 of the ECL was supplemented with the Clean Water Infrastructure Act of 2017, which includes a new program of state financial assistance to municipalities to protect drinking water supplies through the acquisition of land buffers. These funds can be used to acquire open space though voluntary acquisition of title or conservation easements. This law also expands the state's ability to support certain activities by not-for-profits. Finally, Chapter 57 amends the Public Authorities Law in two important ways. First, it allows the state Environmental Facilities Corporation to provide emergency state assistance when public sewers fail or public water supplies are contaminated. Second, it creates a new source of funds for replacing failing septic systems, with a focus on sole source aquifer regions.

Given the nature of these programs, entities with past or present commercial operations in New York, especially in sole source aquifer regions, may want to closely monitor developments because it is inevitable that they will be asked to cover a substantial portion of the cost of protecting public drinking water supplies.

Conclusion

As a result of legislation enacted as part of the 2017 budget, New York has supplemented the authority of DOH and DEC to protect public drinking water supplies. These agencies have also been charged with doing more that the federally mandated minimum when it comes to responding to environmental threats associated with compounds that are not (or not yet) regulated at the federal level. These new mandates will result in the development of a new regulatory program and a new class of sites to be investigated and remediated. Given the nature of these programs, entities with past or present commercial operations in New York, especially in sole source aquifer regions, may want to closely monitor developments because it is inevitable that they will be asked to cover a substantial portion of the cost of protecting public drinking water supplies.